No. 49156-7-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION TWO

TIMBERLAND BANK, a Washington corporation,

Plaintiff/Respondent,

v.

SHAWN A. MESAROS and JANE DOE MESAROS, individually, and the marital community they comprise, THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES: and Also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein,

Defendants/Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Defendant Shawn Mesaros ("Mesaros") appeals the trial court's confirmation of a sheriff's sale. Plaintiff-Timberland Bank judicially foreclosed on commercial property Mesaros owned in Hoquiam, Washington. Timberland Bank was the sole bidder at a sheriff's auction of the property which was held after the Order of Sale expired, and which the public received only 11 days' notice of. When Timberland Bank sought confirmation of the sale, Defendant Mesaros objected and requested an upset hearing.[1] The trial court summarily denied Mesaros' request for an upset hearing, confirmed the sale, and imposed a deficiency judgment against Defendant Mesaros for over $184,000.

II. ASSIGNMENT OF ERROR & ISSUES PERTAINING THERETO

Assignment of Error No. 1

The trial court abused its discretion in confirming the sheriff's sale over Mesaros' objection and request for an upset hearing, and in so doing imposed a deficiency judgment of over $184,000.

[1] An upset hearing establishes the fair value of the property for purposes of determining whether a deficiency judgment should be entered against a judgment-debtor, and if so, in what amount.

Issue No. 1

Did the trial court abuse its discretion by failing to hold an upset hearing when the Property was not competitively bid?

Issue No. 2

Did the trial court abuse its discretion by failing to hold an upset hearing when Mesaros presented evidence of a much higher valuation of the Property?

Issue No. 3

Did the sheriff have authority to sell the Property when the Order of Sale expired twenty two days before the sale?

Issue No. 4

Did the trial court abuse its discretion by failing to hold an upset hearing when there were substantial procedural irregularities in giving notice to the public of the sheriff's sale?

Issue No. 5

What are the publication and notice requirements for a judicial execution sale when the sale is postponed to an unknown date and time?

Issue No. 6

May a trial court correct its abuse of discretion by entering a new order six weeks after appeal has been taken, and in so doing enter findings

not made during the hearing and which may only be made during the upset hearing it denied Mesaros from having?

III. STATEMENT OF THE CASE

A. The Nature of the Property, History of its Valuation, and the Upgrades Mr. Mesaros Performed.

Shawn Mesaros purchased the commercial property at 220 5th Street in Hoquiam ("Property") for $236,500 in August, 2006. (CP 64). At the time, the Property was dilapidated, the roof had fallen in, it was uninhabitable, and in danger of being condemned as a public nuisance. The building was frequented by transients and there was no viable use for the Property. (CP 64-65).

Mesaros invested several hundred thousand dollars to rehabilitate the Property by upgrading the exterior and completely remodeling the interior. He built a new roof, painted the exterior and installed new windows and awnings. Within the interior, Mesaros completely gutted the building and installed a new heating system, fire detection system, flooring, doors, paint, and lighting. (CP 65). The work Mesaros performed substantially increased the utility and value of the Property.

Two independent appraisers substantiated the increase in value created by Mr. Mesaros' work. In 2007, after much but not all of the

remodel work, Timberland Bank commissioned an appraisal of the Property in conjunction with making a loan to Mesaros. That appraisal estimated the upper range of value at more than $1 million. (CP 65). Timberland Bank loaned Mesaros $400,000. (*Id.*). In 2008, Timberland Bank commissioned a second appraisal. This was done in the midst of the recession when Timberland Bank was forced to re-evaluate the real property collateral supporting its loan portfolio. That appraisal – done during the recession – estimated the value of the Property to be more than $450,000. (CP 66). Due to the re-financing requirements banks faced during the recession, Timberland entered a new loan agreement with Mesaros in 2009 in which it loaned Mesaros $375,000 based on the collateral value of the Property. (CP 5).

At the time of the sheriff's sale, the Property was assessed by Grays Harbor County at $567,325. (CP 66). A neighboring property, with less viable commercial prospects than the Property, appraised for $300,000. (*Id.*).

B. The Sheriff's Sale of the Property.

Mr. Mesaros defaulted on the loan with Timberland Bank. (CP 6). Timberland Bank sued for judicial foreclosure and obtained a default judgment on October 13, 2015. (CP 22-26). The default judgment was for

the principal amount of $364,428.28 plus $17,296.57 in interest, fees, and costs. (CP 27). On February 5, 2016, Timberland Bank obtained an Order of Sale directing the Grays Harbor sheriff to sell the Property at auction. (CP 47-49). The order read:

> You are further directed to endorse in ink on this order the day, hour and minute when the order first came into your hands. Execute the Order of Sale and return it to the clerk of the court who issued it within sixty days of its date (unless the time period is extended up to an additional 30 days as allowed by law) along with a return of sale reporting how you have executed on the order of this court.

(CP 49). The Sheriff's office received the Order of Sale on February 11, 2016. (CP 47). Sixty days elapsed on April 5, 2016.

Despite this expiration date, on February 25, 2016, the Sheriff scheduled the sale for April 29, 2016. (CP 37-38). The sale was published in The Vidette, a circular that is approved for Gray's Harbor County. The publication ran for the four weeks preceding April 29, 2016. (CP 41).

On April 29, 2016, the trial court extended its Order of Sale by 30 days. (CP 30-31). Thus, the extended deadline for the sale was May 5,

2016. On April 29, 2016, the Sheriff postponed the sale. (CP __).[2] The postponement notice read: "NOTICE IS HEREBY GIVEN that the sale in the above entitled cause is postponed until further order from the court." *Id.* The Sheriff's Return does not attest whether the postponement was publicly declared.

There is nothing in the record discussing a new sale date until Monday, May 16, when the Sheriff's office posted a new Postponement Notice, stating the sale was postponed until May 27, 2016. As with the previous notice, the Sheriff's Return does not attest whether the postponement was publicly declared. There is no indication within the Sheriff's Return what public postings or announcements, if any, occurred between the April 29th and May 16th postponements. The new postponement notice provided the public with 11 days' notice of the date of sale.

The Property was sold at a foreclosure sale on May 27, 2016, for $202,400. (CP 32-33). Timberland Bank was the sole bidder. This date of sale was not published in The Vidette for the preceding four weeks.

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[2] For unknown reasons, the Clerk's Papers did not include the full Sheriff's Return that was filed, despite being designated. Appellant has designated the entire Sheriff's Return, again, in its Supplemental Designation of Clerk's Papers.

The sale price is less than what Mr. Mesaros originally paid for the Property when it was in a dilapidated condition and before he invested hundreds of thousands of dollars remodeling the Property. The sale price is also only 20 percent of the 2007 appraised value, 50 percent of the 2008 appraised value, and 35 percent of the Property's assessed value. The sale price was only 54 percent of the value which Timberland Bank loaned against the Property during the recession in 2009.

C. The Trial Court's Confirmation of Sale and Denial of Mesaros's Request for a Hearing to Determine the Property's Fair Value.

A hearing was set to confirm the sheriff's sale on June 27, 2016. (CP 54). Mesaros filed a written objection to the Confirmation of Sale. (CP 55-80). Mesaros requested a hearing to establish an upset price. In his written objection, Mesaros explained the history of his ownership of the Property, the upgrades made to improve its value, and its appraisal history. Mesaros' objection discussed and cited the statutory and case authorities explaining the procedure and reasons for holding an upset hearing. Mesaros explained to the Court that he retained an independent appraiser, who anticipated completing an appraisal report within 45 days. (CP 60). Finally, Mr. Mesaros requested an upset hearing be set within 90 days, and a discovery and briefing schedule. (CP 60). The latter was necessary because

Timberland Bank refused to provide Mesaros with copies of the previous appraisals it obtained for the property. (CP 66).

The confirmation hearing was heard on the "cattle call," civil motion docket as is provided for by Grays Harbor LCR 77(f)(1). Mesaros argued for setting an upset hearing citing the appraisal history of the Property and the irregularities in publishing notice of the sheriff's sale. (RAP 2-4). The Court declined to do so, concluding that because Mesaros did not already possess an appraisal report, there was not sufficient evidence to warrant setting an upset hearing. (RAP 7-8). The trial court signed the proposed order offered by Timberland Bank, which is the source of this appeal. (CP 125-128).

Mesaros filed his notice of appeal, three days later on June 30, 2016. (CP 122-128). Mesaros' independent appraiser proceeded with her appraisal of the fair value of the Property, and determined the Property was worth between $380,000 and $560,000. (CP 150). Timberland Bank refused to permit the appraiser access to the interior of the building. (CP 148).

After receiving the notice of appeal, Timberland Bank presented an entirely new proposed order making a series of detailed findings that the trial court did not make during the June 27 hearing. Mesaros objected to

this new proposed order. (CP 129-132). The trial court overruled Mesaros's objections and signed Timberland's new proposed order on August 22, 2016. This Court determined that the Order of Sale was appealable as a matter of right ten days earlier on August 12, 2016. Timberland Bank did not file a motion with this Court pursuant to RAP 7.2(e) to enter the trial court's new order.

IV. ARGUMENT

A. Standard of Review

The standard of review in this case is for an abuse of discretion because the fixing of an upset price at a judicial sale is a matter within the trial court's discretionary powers. *American Fed. Sav. & Loan Ass'n. of Tacoma v. McCaffrey,* 107 Wn.2d 181, 187, 728 P.2d 155 (1986); *Nat'l Bank of Wash. v. Equity Investors,* 81 Wn.2d 886, 927, 506 P.2d 20 (1973).

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Nat'l Bank, 81 Wn.2d at 927 (quoting *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)(internal citations omitted)).

B. The Statutory Requirement for Judicial Confirmation and Provision of an Upset Hearing is Designed to Ensure Courts Exercise Their Equitable Powers to Protect the Rights of Creditors and Debtors, Which the Trial Court Failed to Consider.

A sheriff's sale requires confirmation by the Court before the property is deemed sold. Until confirmation, the winning bid is only an offer to buy. *Ehlers v. Campbell,* 147 Neb. 572, 577, 23 N.W.2d 727 (1946). Consequently, a "trial court has broad, supervisory duties and powers" and may on its own motion "refuse to confirm the sale merely because of inadequacy of price." *Id.* This authority arises from statute:

> In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.
>
> The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing,

> establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation. If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted.

RCW § 61.12.060 (Emphasis added).

There are equitable reasons for requiring judicial confirmation of a sheriff's sale. "The exercise of judicial discretion by a court of equity requires equal concern for the rights of both creditor and debtor." *Ferree v. Fleetham,* 7 Wn. App. 767, 772, 502 P.2d 490 (Div. 1, 1972). At the heart of this concern is the social philosophy that in certain circumstances, justice requires equity to intervene in aid of the debtor at the expense of the creditor. *Id.* "The judicial objective is then to insure that the remedy afforded a judgment creditor by means of a judicial sale does not deprive a judgment debtor of the fair market price for his property." *Id.* It is against this social policy that this Court must weigh whether the trial court appropriately exercised its discretion in denying Mesaros' request for an upset hearing and imposing a deficiency judgment against him.

A debtor should be protected from a deficiency judgment resulting from an unreasonably low sale price of the property. When this occurs, the debtor is entitled to object to confirmation of the sale and request an upset price. A low sales price is a "basis" to hold an upset hearing. *Casey v.*

Chapman, 123 Wn. App. 670, 683, 98 P.3d 1246 (2004)(citing *Lee v. Barnes*, 58 Wn.2d 265, 362 P.2d 237 (1961))("Where a creditor seeks to sell collateral for a low price and also seeks a deficiency, there is a basis to set an upset price as a condition to confirming a sale"). The upset price is then credited against the judgment, and the judgment creditor is entitled to a deficiency judgment for the remainder.

Two issues of particular importance in a court's determination of whether to exercise discretion and establish an upset price is whether there was competitive bidding at the sale, and whether the price obtained at the sale reflected fair value. *Lee v. Barnes*, 61 Wn.2d 581, 585-86, 379 P.2d 362 (1963). Generally, "mere inadequacy" of price, alone, is not enough to vacate a judicial sale. *Miebach v. Colasurdo*, 120 Wn.2d 170, 177-178, 685 P.2d 1074 (1984). However, if the price is so low as to "shock the conscience," then the sale may be set aside. *Id.* Alternatively, an inadequate sale price coupled with "slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside on equitable grounds." *Id.* (internal citations omitted)(emphasis added); 30 Am. Jur. 2d Executions, Etc. § 432.

Here, the trial court undertook none of this analysis before it confirmed the sheriff's sale and imposed a deficiency judgment against Mesaros. The trial court failed to consider the fact that Timberland Bank, as judgment creditor, was the sole bidder at the sheriff's sale and that

Timberland Bank obtained the Property for only half the value of its judgment and less than half of the value of the Property according to all prior appraisals, the bank's lending underwriter and the county's tax assessor. Those factors indicate the Property was sold at less than a fair market price. The inadequate sale price, in combination with the procedural irregularities of the sale, warranted an upset hearing to protect the judgment debtor's interest. The trial court abused its discretion in not holding such a hearing.

C. The Trial Court Abused its Discretion when It Denied Mesaros' Request for an Upset Hearing and Imposed a Deficiency Judgment Against Mesaros Based Solely on the Fact That Mesaros' Current Appraisal Had Not Been Completed.

The trial court abused its discretion by declining to set an upset hearing without considering the evidence presented by Mesaros. The trial court did not consider multiple sources of information indicating that the fair value of the Property greatly exceeded the $202,400 sales price. (CP 64-78). The trial court also ignored the irregularities in the sale process that Mesaros raised during oral argument. (RAP 3-5). Instead, the trial court reasoned that no upset hearing was warranted because Mesaros did not present an appraisal report. This was an abuse of discretion because the appraisal report is the evidence that would be considered at the upset hearing, not beforehand.

In *McCaffrey,* the lender judicially foreclosed on eight units of an apartment complex to satisfy its judgment. It was the sole bidder at a sheriff's sale. When the lender moved for judicial confirmation, the debtor objected and moved for the establishment of an upset price. The trial judge denied the confirmation, granted the motion to establish an upset price, and remanded the case for trial for that purpose. 107 Wn.2d at 157. Although the debtors offered an appraisal report with their objection to confirmation, the appraiser's testimony was not heard until the upset hearing. *Id.* at 157-58. This appraisal was offered in addition to other evidence the debtors offered at the confirmation hearing showing factors which contributed to a lack of competitive bidding at the sheriff's sale. *Id.* at 160. However it was not until the upset hearing that the trial court took the testimony and evidence of the property's value and condition. *Id.*

The trial court did not follow *McCaffrey*'s approach. Instead, the trial court denied Mesaros' request for an upset hearing because he did not offer a current appraisal report at the time he objected to confirmation of the sale. The trial court required Mesaros to put into evidence a completed appraisal at the time Mesaros objected to confirmation of the sale and requested an upset hearing, which evidence is more properly considered at the upset hearing itself. In so doing, the trial court ignored that Mesaros

was in the process of obtaining an appraisal report. Furthermore, Timberland Bank would not allow Mesaros' appraiser access to the Property to complete her appraisal. The trial court also ignored evidence that past appraisals valued the Property at two or three times the price obtained at the sheriff's sale, other evidence similarly showed a higher value for the Property, and there were substantial irregularities in the sale process. Despite all this evidence, the trial court confirmed the sale and denied Mesaros an upset hearing on the sole basis that Mesaros did not offer a completed appraisal report at the time he objected to confirmation. This was an abuse of discretion.

D. The Sheriff's Sale Occurred After the Order of Sale Expired, Which Rendered the Sheriff's Sale Void.

The sale occurred after expiration of the Order of Sale and was therefore void. By the Order of Sale, the Property was to be sold within sixty days. (CP 49). Timberland Bank was unable to get a Sheriff's sale within that period, and so requested and received a thirty day extension. Yet, even with the thirty day extension, the sale was conducted 22 days after the Order of Sale expired. Therefore, the Order of Sale was void at the time of the May 27, 2016, sale.

Both statute and case law compel a finding the trial court abused its discretion by confirming a sale that was void. RCW § 6.17.120 imposes a duty on the sheriff to sell the property within sixty days of the Order of Sale:

> The sheriff or other officer shall indorse upon the writ of execution in ink, the day, hour, and minute when the writ first came into his or her hands, and the execution shall be returned with a report of proceedings under the writ within sixty days after its date to the clerk who issued it. [...]

(Emphasis added).

A sheriff may postpone a sale pursuant to an Order of Sale up to thirty days. RCW § 6.21.050(2)("The sheriff for like causes may also adjourn the sale from time to time, not exceeding thirty days beyond the day at which the writ is made returnable, with the consent of the plaintiff indorsed upon the writ"). Further, the sheriff must give notice of every postponement by public proclamation at the time of the original sale date, and post written notices of such postponement. *Id.*

The sale occurred more than 90 days after the Order of Sale was issued. It was held 112 days after the Order of Sale. Consequently, the sheriff acted without authority in selling the Property on May 27, 2016. RCW § 6.17.120's use of the mandatory language "shall" restricts the duration of the sheriff's power to sell. Similarly, RCW § 6.21.050 limits the sheriff's authority to extend the sale date. Since the sheriff sold the Property according to an expired Order of Sale, and had no authority to extend the sale beyond the statutory limits, the sheriff's sale was void. 30 Am. Jur. 2d Executions, Etc. § 455 (2016)("Where the time of sale is prescribed by statute, the execution officer has no authority to sell at any

other time, and if he or she does sell, his or her acts are not merely irregular, but void").

In *Chase v. Cannon*, the Eastern District of Washington reached the same result for a sheriff's sale held beyond the statutory 60 day period. 47 F. 674 (E.D. Wash. 1891). In *Chase*, creditors asserted the district court had no jurisdiction to address claims relating to land which was the subject of a writ of execution issued by a state court. The district court agreed that normally it would have no jurisdiction over the land, but because the sheriff's sale was not executed within the statutory 60 day requirement, the writ of execution was void. *Id.* at 675-76.

Washington's Supreme Court reached the same result in a non-judicial foreclosure setting. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). In *Albice*, the trustee held a sale 161 days after giving notice. This exceeded the statutory deadline of 120 days. *Id.* at 568 (applying terms of Deed of Trust Act, RCW § 61.24.040). Therefore, the trustee's sale was invalid. *Id.* This is because the trustee "lost statutory authority after it continued the sale past 120 days..." *Id.*

Although *Albice* applied the Deed of Trust Act, its interpretation of RCW § 61.24.040(6) is apt here. RCW § 61.24.040(6) states that a trustee's sale may be continued for a period "not exceeding a total of one hundred twenty days..." This is the same language the Legislature used in RCW §

6.21.050 (sheriff may adjourn sale "not exceeding thirty days beyond..."). *Albin* found that a plain reading of this provision "unambiguously limits the trustee from continuing the sale past 120 days." *Id. Albice* further observed:

> When a party' authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required.

Id.; see, also, Neblett v. Slosson, 223 S.W.2d 938, 940 (Tex. Civ. App., 1949)(Sheriff's sale was void when not made in accordance with the execution issued upon the judgment).

These statutory "formalities" established by law for execution sales of property cannot be waived, even by the debtor. *Briggs v. Murray,* 29 Wn. 245, 260, 69 P. 765 (1902).

The Order of Sale expired before the sale. The sheriff's statutory authority to sell lapsed and the sale was invalid. Accordingly, the trial court erred in confirming the sale.

E. The Trial Court Abused its Discretion by Not Examining Whether the Notice of Sale Procedures Were Properly Followed and Whether the Improper Notice Resulted in a Lack of Competitive Bidding.

The sheriff was required to post notice of the sale at the Courthouse, at the Property, and publish the notice for a period of four weeks prior to

the date of sale. RCW § 6.21.030(2). The Sheriff attests to having published the notice of sale in the Vidette for the four weeks preceding the original sale date of April 29, 2016. However, the sale was not held on April 29, 2016. Rather, on that date, the sale was postponed to an indefinite future date to be ordered by the court. Eventually, the sale was rescheduled for May 27, 2016. However, the new sale was not advertised in the Vidette for the four weeks preceding that date. RCW § 6.21.030(2) requires publication once a week for the four weeks "prior to the date of sale." Nothing within this statute indicates the publication requirement in judicial foreclosures is excused if the sale is *indefinitely* postponed at the time of the original sale date.

Timberland Bank may argue that RCW § 6.21.050(2) only requires a public proclamation and posting a written notice to extend the sale date. However, those minimum requirements are only in reference to postponements of one week. The authority which allows a sheriff to "adjourn the sale" not exceeding thirty days does not answer whether simple public proclamation and posted written notice is enough, or whether publication in a newspaper is also necessary. Regardless of which is required, the sheriff did neither when he postponed the sale indefinitely. (RP 3-4). The sheriff did not publish in the newspaper, and the Sheriff's Return does not attest that the postponement was publicly declared.

Further, when the sheriff finally selected a new sale date, he did not follow the procedures for announcing it. The sheriff did not announce the new sale date when he postponed the sale on April 29, 2016 because he did not know the new sale date then. The first attempt to notify the public of the new sale date was on May 16, when the sheriff posted a new Postponement Notice, stating the sale was postponed until May 27, 2016. May 16, 2016, was a Monday. Sheriff's sales are required to be held at the courthouse on Fridays. RCW § 6.21.050(1).[3] Thus, no interested buyers would have been present on May 16 to hear of the postponement. Similarly, interested buyers would not have known to be present on May 16 to hear of the postponement (assuming it was publicly proclaimed), because the April 29 postponement notice did not direct the public to a new date. 30 Am. Jur. 2d Executions, Etc. § 399 (2016)(purpose of requiring execution sales occur at prescribed times is to ensure all know when to attend to purchase the property sold). Indeed, the April 29 postponement failed to comply with RCW § 6.21.050(2) because it failed to provide the public with notice of the new postponement date. *See In re Fritz,* 225 B.R. 218, 221-222 (E.D. Wash. 1997)(requiring trustee to give notice of the time and place of the postponed sale in non-judicial, trustee sale).

Because the April 29, 2016, postponement provided no new date, no public proclamation could have occurred. This essentially nullified the

[3] Unless the Friday is a holiday. Here, the Friday preceding May 16, 2016, was not a holiday.

Vidette's earlier publication of the sale. In other words, if this Court were inclined to find that a postponed sheriff's sale need not be re-published in the usual course, it should nonetheless reverse the trial court here because this postponement did not notify the public of a new date.

As a result of these postponements and limited public notice, the Sheriff's sale was not competitively bid. "[T]he upset provisions may be invoked in any case where all of the circumstances leading to and surrounding a foreclosure sale warrant the exercise of discretion in finding that there will be [or was] no true competitive bidding." *McCaffrey*, 107 Wn.2d at 187-88. No competitive bidding occurred in this case because the only way an interested buyer would have known of the May 27 sale date is if they walked by one of the two written postings during the eleven day period between May 16 and May 27. This was not a reasonable time or means to attract the attention of buyers of commercial property. "The 'ordinary and usual manner' in which a sale at fair market value is assured is by exposing the property to knowledgeable competitive bidders at public sale." *Ferree v. Fleetham*, 7 Wn. App. 767, 772, 502 P.2d 490 (Div. 1, 1972). Indeed, "[it] is the policy of the law that execution sales should be so conducted as to multiply bidders, promote competition, and effect sale of the property to the highest responsible bidder." *Williams v. Continental Sec. Corp.*, 22 Wn.2d 1, 11, 153 P.2d 847 (1944)(citing 21 Am. Jur. 113, Executions § 220; 33 C.J.S. p. 438, Executions § 201).

This policy was not met because the statutory requirements for giving notice of the actual sale date were not followed. The trial court abused its discretion in failing to acknowledge the substantial irregularities in the sale process and to consider how these irregularities contributed to a lack of competitive bidding on the Property. *See Terry v. Terry*, 70 Idaho 161, 167, 213 P.2d 906 ("where it appears from positive extrinsic evidence that the land was not actually offered for sale or sold at the time and place stated in the notice of sale . . . then such sale is void").

F. The Trial Court Abused its Discretion By Not Considering the Lack of Competitive Bidding for the Property.

Even ignoring the lack of notice and publication, an upset hearing remained warranted. The *McCaffrey* court explained that it did not matter why there was no competitive bidding; if there was no competitive bidding, then an upset price should be established:

> It is of little moment in a particular case whether it is temporary economic fluctuations, peculiarly local conditions in the real-estate market, or a national economic depression which will militate against reasonably competitive bidding. If, because of the kind, nature, scope or peculiarities of the property, or a depressed economy, local or general, genuinely competitive bidding will be substantially discouraged or even stifled, the court in its discretion may, under the statute, prescribe an upset price.

McCaffrey, 107 Wn.2d at 187 (quoting *Nat'l Bank*, 81 Wn.2d 886, 925). Courts "ordinarily exercise" their discretion to establish an upset price in cases of foreclosure of corporate property which is of such size and character as to preclude the establishment of a fair price by competitive or cash bidding. *Lee v. Barnes*, 61 Wn.2d 581, 585, 379 P.2d 362 (1963). The trial court did not exercise that discretion, and did not explain its reasoning for denying an upset hearing given this lack of competitive bidding.

G. The Trial Court Abused its Discretion by Imposing a Deficiency Judgment onto Mesaros Without First Determining the Fair Value of the Property.

The trial court abused its discretion by imposing a deficiency judgment while at the same time refusing to consider whether the price obtained at the sale reflected fair value. *Lee v. Barnes*, 61 Wn.2d at 585-86, 379 P.2d 362 (citing *Farmers and Mechanics Sav. Bank of Lockport v. Eagle Building Co.*, 271 N.Y.S. 306 (1934); *Nat'l Bank*, 81 Wn.2d at 924 ("the purpose of fixing an upset price is to assure the mortgagor of a fair price")). Mesaros offered several sources of past valuations of the Property which were multiples higher than the $202,400 sales price. The trial court did not consider that evidence, and did not explain why. Instead, it was only interested in an appraisal report.

In light of the significant deficiency judgment it entered against Mesaros, and the competing evidence of a higher valuation, the trial court acted arbitrarily in requiring Mesaros to present an appraisal report before

allowing an upset hearing. The trial court ignored the fact that Mesaros already retained an appraiser and expected such a report within 45 days. The trial court also ignored that Timberland Bank refused to provide Mesaros with the previous appraisals showing a much higher valuation. The trial court did not take stock of the fact that Timberland Bank itself felt the value was much higher when it loaned $400,000 and $375,000 on the Property based on these previous appraisals. And the trial court failed to consider that appraised value is the evidence that is to be presented at an upset hearing, which the court refused to hold.

Lee v. Barnes is the primary opinion in this state on upset hearings. The case went on appeal to the Supreme Court twice. In the first round, the Supreme Court found the trial court erred in denying the defendant-debtor's motion to set an upset price. 58 Wn.2d 265, 273, 362 P.2d 237 (1961). The lower court erred because the public sale procedure lent no assurance that a fair value would be bid. *Id.* at 274. The sale price was one-sixth of the price that the property sold for just 4.5 years earlier. *Id.* In this way, *Lee* mirrors the present case. The sheriff's sale was continued and then re-set with just 11 days' notice. No publication in the county newspaper advised the public of the new sale date. The price of $202,400 was approximately half the value at which Timberland loaned money on it during the recession six years earlier, and approximately $1/5^{th}$ of what it appraised before the recession.

Following remand, the trial court in *Lee* set an upset price greater than what was bid. 61 Wn.2d 581, 379 P.2d 362 (1963). However, its methodology in doing so was in error. The appropriate method for determining an upset price is for the trial court to "assume the position of a competitive bidder determining a fair bid at the time of sale under normal conditions." *Id.* at 586. This to ensure that the "owner of the mortgage debt, [i.e., Timberland Bank] ..., should not be permitted to take an unconscionable advantage of [its] position." *Id.* (quoting *Eagle Bldg. Co.,* 151 Misc. 249, 271 N.Y.S. 306). In the instant case, the trial court abused its discretion by failing to even consider what a competitively bid auction would have yielded.

In evaluating fair value, the court may consider the state of the economy and local economic conditions, the usefulness of the property under normal conditions, its potential or future value, the type of property involved, its unique qualities, if any, and any other characteristics and conditions affecting its marketability along with any other factors which a bidder might consider in determining a fair bid for the mortgaged property. *Nat'l Bank*, 81 Wn.2d at 926; *Lee,* 61 Wn.2d at 586-87; RCW § 61.12.060. The value to be determined by the Court is the fair value, not the minimum value. *Id.* The trial court did not consider any of these fair value factors during the June 27, 2016, confirmation hearing.

Cases in other states provide some guideposts on when judicial sales' prices are grossly inadequate. A sales price which was 85 percent of the appraised price did not warrant denying confirmation. *Farm Credit Bank of Wichita v. Zerr,* 22 Kan. App. 2d 247, 257, 915 P.2d 137 (1996). A sale which was 32 percent of the reasonable value did justify denial of confirmation though. *Id.* at 256 (citing *Broughton v. Murphy,* 155 Kan. 454, 126 P.2d 207 (1942)). A sale which generated a winning bid of just over half the value of the property also warranted denial of confirmation. *Ehlers v. Campbell,* 147 Neb. 572, 577, 23 N.W.2d 727 (1946).

Here, the sale price was anywhere from 20 to 50 percent of what the Property previously appraised for. Timberland obtained the Property at the sheriff's sale for only 54 percent of the amount which it loaned against the Property in 2009. Given the facts surrounding this sale, it is inequitable to allow Timberland Bank to obtain this Property for $202,400 when it valued the Property for more than double that amount when it loaned Mesaros money several years prior. Further inequity is present here because the sale was not competitively bid, in large part because of the inadequate posting of notices to apprise the public of the sale. Given these inequities, and the trial court's failure to determine the fair market value of the Property, it was an abuse of discretion to impose the significant deficiency judgment against Mesaros.

H. Timberland Bank's New Proposed Order Did Not Remedy the Trial Court's Abuse of Discretion.

Upon receiving the notice of appeal, Timberland Bank attempted to fix the trial court's abuse of discretion by presenting a new proposed order containing a litany of factual findings that the trial court did not make during the June 27 confirmation hearing. This was not made during a hearing on a motion for reconsideration. This occurred during a presentation of order six weeks later, after this Court accepted review. Neither Timberland Bank nor the trial court sought permission from this Court to do so. Therefore, the new proposed order is of no effect because the trial court violated RAP 7.22(e):

> [...] If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion. [...]

Division 1 addressed a similar end-run attempt in *State v. Pruitt,* 145 Wn. App. 784, 187 P.3d 326 (Div. 1, 2008). In *Pruitt,* the criminal defendant filed an appeal. The trial court then entered findings and conclusions in a second trial without first seeking approval of the court of appeals, which was then considering the appeal. *Id.* at 793. Division I

rejected the State's argument that the trial court merely fixed clerical errors because the new findings "dramatically altered the issues on appeal. It effectively rendered moot both assignments of error..." *Id.* at 794. So too here. The new proposed order made the sort of findings that could only be made during an upset hearing. It dramatically alters what is currently on appeal. Therefore, Timberland Bank was required to seek leave from this Court before entry of this new proposed order. It failed to do so, and therefore violated RAP 7.2(e). It also failed to comply with Grays Harbor's LCR 52, which requires proposed orders be presented within 15 days of the decision.

The trial court's adoption of this new proposed order is inexplicable given that it denied the opportunity to hold an upset hearing, but then proceeded to make findings that can only be made at an upset hearing. When a trial court makes a "wholesale and verbatim adoption of one party's findings," there is cause to "review the record and the district court's opinion more thoroughly." *Silver v. Executive Car Leasing Long-Term Disability Plan,* 466 F.3d 727, 733 (9th Cir. 2006). Indeed, the Ninth Circuit reviews such orders with "special scrutiny." *Id.* This is because such a wholesale adoption of findings raises the "possibility that there was insufficient independent evaluation of the evidence..." *L.K. Comstock &*

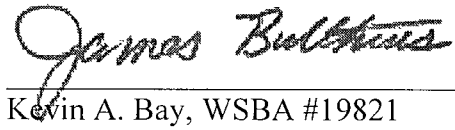
Co., Inc. v. United Engineers & Constructors Inc., 880 F.2d 219, 222 (1989)(quoting *Photo Elecs. Corp. v. England,* 581 F.2d 772, 777 (9th Cir. 1978)).

This new proposed order made the sort of findings that can only be made during an upset hearing. The trial court denied Mesaros' request for an upset hearing. Therefore, the trial court abused its discretion in signing Timberland Bank's new order finding the "fair value" of the property was $202,400. The trial court's decision to set a fair value without conducting an upset hearing was error.

V. CONCLUSION

Mr. Mesaros respectfully requests this Court reverse the trial court, vacate the sheriff's sale, and order a new sale be had subject to an upset hearing. The sheriff sold the Property subject to an expired Order of Sale, and so the sale was void. The statutory notice procedures were not followed for this sale. These violations of statutes resulted in an auction of the Property which was not competitively bid, and an unacceptably low sale price. The trial court abused its discretion by confirming the sale and denying an upset hearing in light of these irregularities and price.

TOUSLEY BRAIN STEPHENS PLLC



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CERTIFICATE OF SERVICE

I, [name], hereby certify that on the 30th day of January, 2017, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

James T. Parker Parker, Winkleman & Parker, PS 813 Levee Street PO Box 700 Hoquiam, WA 98550	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Hand Delivered Overnight Courier Facsimile Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 30th day of January, 2017, at Seattle, Washington.

Krista Stokes

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